Supreme Court, U.S.
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No. 06-299

In the
Supreme Court of the United States

WILLIAM F. HEGGER,

Petitioner,

v.

VISTEON AUTOMOTIVE SYSTEMS, INC., and FORD MOTOR CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did not the Sixth Circuit panel err in holding that the record did not reveal one or more genuine issues of material fact within the meaning of Rule 56 of the Federal Rules of Civil Procedure, thereby impermissibly permitting the entry of summary judgment predicated on matters of intent, motive, perception, and/or party witness credibility?

A LIST OF ALL PARTIES TO THE PROCEEDING AND AFFILIATIONS AS REQUIRED BY SUPREME COURT RULE 29.6

All parties involved are named in the caption. There are no parent companies nor any nonwholly owned subsidiaries within the meaning of Supreme Court Rule 29.6.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication.

CONCISE STATEMENT OF THE BASIS OF THE JURISDICTION OF THE UNITED STATES SUPREME COURT

1. The United States Court of Appeals for the Sixth Circuit issued its written opinion on June 2, 2006.

2. There is no Order respecting rehearing, nor is there any Order granting an extension of time to file the petition for a writ of certiorari.

3. Supreme Court Rule 12.5 is not applicable to this petition for the writ of certiorari in that this is a petition for the writ of certiorari predicated on errors made by the United States Court of Appeals for the Sixth Circuit. The statute conferring United States Supreme Court jurisdiction over the instant controversy is believed by the petitioners to be 28 U.S.C. § 1252.

4. In that neither the United States nor any department thereof is a party to these proceedings, the provisions of Supreme Court Rules 29.4[b] and [c] are not applicable.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

42 U.S.C. § 2000e-2[a][1],[2]. Unlawful employment practices.

[a] Employer practices

It shall be unlawful for an employer-

[1] to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, or national origin; or

[2] to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Rule 56[b],[c], Federal Rules of Civil Procedure. Summary Judgment.

[b] For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[c] Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

CONCISE STATEMENT OF THE CASE

Federal jurisdiction in the United States District Court for the Middle District of Tennessee was founded on 28 U.S.C. § 1331, in that this is a suit for money damages occasioned by racial discrimination in violation of Title VII. William Hegger went to work for these defendants at the Nashville Automotive Glass Plant in 1996 The racial discrimination relevant to the case *sub judice* involves both direct discrimination, largely distinctions of discipline, and a hostile work environment evidenced principally by racial epithets. Merely by way of example, Mr. Hegger suffered an ersatz application for work with Rev. Jesse Jackson and a Ku Klux Klan card put in his personal workspace provide a vivid but by no means complete example of just exactly how truly hostile the plaintiff's work environment was. The hostile work environment aspect of this matter was a continuing issue. In Mr. Hegger's judgment, white employees were treated differently – less severely - in matters of employee discipline than he, and other African-American employees.

REASONS FOR GRANTING THE PETITION

The difficulty with the Opinion of the Sixth Circuit is that it serves to place judicial *imprimatur* on a District Judge having substituted his judgment for that of the jury in a Rule 56 context. That is impermissible. Under most circumstances, clearly including those presented here, lawsuits that rise or fall on questions of motive, intent, or perception[s] of a party are definitionally inappropriate for summary judgment. Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2732.3; *see also, e.g., Lam v. University of Hawaii,* 40 F.3d 1551 at 1560ff. (9th Cir. 1994); *Kerzer v. Kingly Mfg. Co.,* 156 F.3d 396 at 400 (2d Cir. 1998); *Hafford v. Seidner,* 183 F.3d 506 at 513ff. (6th Cir. 1999).

Appellate courts construing Rule 56 standards consistently hold that where, as here, the outcome hinges in whole or in part on state of mind, intent, or witness credibility, summary judgment should not be granted. Perhaps an even greater problem than that of motive/intent/perception is the critical importance of witness credibility, most particularly in circumstances like the instant case where perception and credibility are inextricably intertwined. Where there exists doubt as to the credibility of a material witness – not to mention a party – summary judgment is never appropriate. Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 2726; *Moore's Federal Practice* § 56.15[3]. There is no better-settled rule than that where dispositive motions are concerned, "...witness credibility is solely within the jury's province, and [courts] may not...make credibility determinations." *U.S. v. L.E. Cooke Co.,* 991 F.2d 336 at 343 (6th Cir. 1993); *Noble v. Brinker Intern., Inc.,* 391 F.3d 715 at 724 (6th Cir. 2004). This court's observation that "...a summary disposition...should be on evidence which a jury would not be at liberty to disbelieve..." is of no less value

today than it was sixty-one years ago. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 at 624 (1944) There is no need to belabor the matter. The motives and credibility of the parties are matters of fact for the jury, not matters of law for the court. In the case *sub judice,* for whatever reason or reasons, the Sixth Circuit either ignored or misconstrued these linchpin principles. In the concluding paragraph of the Sixth Circuit's Opinion, the author, District Judge Cook, flatly held (in speaking for the entire panel) that the record disclose genuine issues of material fact. That could be true only if District Judge Haynes did that which was in effect read the collective mind of a corporate defendant employer. That is precisely what Judge Haynes did. It was, and remains, reversible error. There can be no serious doubt but that the Sixth Circuit's Opinion in this case is squarely at odds with the rules enunciated in the Second and Ninth Circuits, and at least in some degree with its own reasoning as articulated in *Hafford.*

CONCLUSION

For these reasons, concepts of fundamental fairness require that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5256

[Filed June 2, 2006]

WILLIAM F. HEGGER,	)
Plaintiff-Appellant	)
	)
v.	)
	)
VISTEON AUTOMOTIVE SYSTEMS, INC.	)
And FORD MOTOR Co.,	)
Defendants-Appellees	)
	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
03-00657
William J. Haynes, Jr., U.S. District Judge

Before: SILER, GRIFFIN, Circuit Judges; COOK, District Judge.*

* The Honorable Julian Abele Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

COOK, District Judge. The Plaintiff-Appellant, William F. Hegger, appeals the grant of a summary judgment by the district court in favor of the Defendants-Appellees, Visteon Automotive Systems, et al. On the basis of the record, we affirm the entry of the summary judgment and deny Hegger's appeal.

I.

On July 22, 2003, Hegger filed a complaint in the United States District Court for the Middle District of Tennessee, in which he accused his employers, Visteon Automotive Systems, and the Ford Motor Company, as well as his union, United Auto Workers International, of (1) race and age discrimination, (2) racial harassment and hostile work environment, (3) acts of retaliation in the form of disparate measures of discipline, (4) a deliberate failure to hire and/or promote him in violation of existing law, and (5) an undeserved constructive discharge from his employment.[1]

On January 3, 2005, the district court granted Visteon's motion for the entry of a summary judgment after concluding that Hegger had failed to proffer a sufficiency of evidence upon which to support his claims of disparate treatment under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-401 et seq ("THRA"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 and 623(d)("ADEA"). The district

[1] In 2000, Visteon became a wholly owned subsidiary of the Ford Motor Company. Hegger and other hourly employees of Ford at the time of this corporate realignment were loaned to Visteon.

court also determined that his Title VII discriminatory claims neither occurred within the applicable limitations period nor were supported by any set of facts which would be sufficient to satisfy a judgment under Title VII, the THRA, or the ADEA. This appeal followed.

II.

Hegger, an African American, began his employment with the Ford Motor Company in 1996 at its Glass Plant facility in Nashville, Tennessee. During the course of his employment, he filed two charges of unlawful racially discriminatory conduct by his employers with the Equal Employment Opportunity Commission ("EEOC"); one in 1998 and the other in 2002. When Hegger filed his first EEOC charge in 1998, he detailed a series of incidents between August 26, 1996 and February 7, 1998 which served as the bases for his complaints.[2] Although he was issued a right-to-sue letter by the EEOC, no lawsuit was ever filed by him within the designated statutory framework. In 2002, Hegger filed another charge with the EEOC, contending that his employers had subjected him to unlawful employment decisions on the basis of his race and age.

During the period of time between the filing of these two EEOC charges, Hegger had been disciplined by his employers on three separate occasions for absenteeism. There was also evidence presented to the district court that the human

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[2] The incidents that were referenced by Hegger in the 1988 EEOC charge included his receipt of, among other things, (1) an unwanted handwritten card from the Ku Klux Klan, and (2) unsolicited sexually explicit jokes from some unidentified co-workers.

resources personnel department ("HRPD") had received complaints from fellow-employees which indicated that Hegger had exhibited some strange and inappropriate behavioral patterns in and around the workplace. As a consequence, he was (1) placed on paid medical leave in accordance with the collective bargaining agreement and (2) required to undergo a psychological exam. Upon returning to work, Hegger attended a disciplinary hearing, in which he was assessed a thirty day suspension.[3]

III.

As an appellate court, we must review the entry of a summary judgment by utilizing a *de novo* standard of review. *See Kocak v. Community Health Partners of Ohio,* 400 F.3d 466, 468 (6th Cir. 2005); *Farhat v. Jopke,* 370 F.3d 580, 587-88 (6th Cir. 2004). However, the "summary judgment will be affirmed if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact' as to an essential element of the non-moving party's case." *Farhat,* 370 F.3d 580, 587 (6th Cir. 2004)(quoting Fed.R.Civ.P. 5(c)). "An issue of fact is 'genuine' if a reasonable person could return a verdict for the non-moving party." *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Finally, "the party bearing the burden of proof must present a jury question as to each element of its case." *Sharma v. Ohio State University,* 25 Fed. App'x. 243, 246 (6th Cir. 2001).

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[3] Inasmuch as Hegger had already incurred a thirty day paid leave, it was treated as "time served" which enabled him to resume his work immediately.

Although Hegger timely filed this lawsuit on the basis of his claims arising out of the 2002 EEOC charge, these allegations improperly included incidents that had been a part of the 1998 EEOC charge. As such, we will only review Hegger's disparate discipline claims under Title VII and THRA by utilizing the traditional summary judgment framework.[4]

IV.

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminating against any individual . . . because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-2. In 2001, we declared that the "plaintiff in a Title VII case bears the initial burden of proving discrimination by the defendant." *Sharma v. Ohio State University,* 25 Fed. App'x. 243, 246 (6th Cir. 2001). Thus, a Title VII plaintiff may "satisfy this burden by presenting direct evidence of discrimination actions by the defendant or by showing the existence of circumstantial evidence that creates an inference of discrimination." *Id.* at 247.

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[4] In Hegger's brief, he stated, "Appellant's claims . . . are predicated on [Title VII]. For the purposes of this appeal, William Hegger takes no position on the dismissal of his ADEA and Family Medical Leave Act ("FMLA") claims. [However,] pendent jurisdiction for plaintiffs claims under [the THRA] also attaches." Appellant Br. 7. Although not entirely clear from a reading of his brief, it appears that Hegger is only challenging the summary judgment decision by the district court as it relates to his Title VII and THRA claims.

1. Direct Evidence

In a direct evidence case, the plaintiff must present "direct testimony that the employer acted with a discriminatory motive." *Birch v. Cuyahoga County Probate Court,* 392 F.3d 151, 172 (6th Cir. 2004). Direct evidence requires a conclusion by the fact finder that unlawful discrimination was at least a "motivating factor" for the employer's actions. *Terbovitz v. Fiscal Court of Adair County,* 825 F.2d 111, 114-15 (6th Cir. 1987). If the plaintiff is successful in demonstrating the existence of unlawful discriminatory conduct by the employer, the burden of persuasion shifts to the defendant to show that the challenged employment tenure would have been terminated even if it had not been motivated by discrimination. *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.,* 176 F.3d 921, 926 (6th Cir. 1999).

In this case, Hegger is unaware of the identity of those persons who, in his judgment, are responsible for the alleged discriminatory conduct at his workplace. Moreover, Hegger has been unable to present any evidence which links the decisions by management to the conduct about which he has complained. Although he contends that the thirty-day suspension for his alleged bizarre behavior was the product of a racial animus, it appears from the record that the employer proffered a facially legitimate business reason for its administrative action. Rather than imposing another thirty day suspension period upon him, the company essentially considered his medical leave as "time served." Contrary to Hegger's position on this issue, it suggests that his employer was accommodating and displayed sensitivity under these circumstances.

Consequently, we conclude that Hegger has failed to establish that (1) an act of unlawful discrimination was at least

a motivating factor in his employer's decision to administratively discipline him or (2) the company acted with a discriminatory motive. Accordingly, Hegger has failed to proffer any direct evidence of illegal discriminatory conduct by Visteon.

2. Circumstantial Evidence

In order to survive the entry of a summary judgment in a Title VII claim through the use of circumstantial evidence, the plaintiff must show that he (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified, and (4) was treated less favorably than a similarly situated employee outside the protected class. *Sharma,* 25 Fed. App'x at 247. "Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant does so, the burden shifts back to the plaintiff to prove the reason advanced is pretextual." *Id.* (citations omitted). Those claims that arise under the THRA "are analyzed under the same framework as those under Title VII." *Rhea v. Dollar Tree Stores, Inc.*, 395 F. Supp. 2d 696, 2005 WL 2600213, at 7 (W.D. Tenn. 2005)(citing *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 31 (Tenn. 1996)).

As a preliminary matter, Hegger's Title VII allegations are limited to those claims that were asserted by him in his 2002 EEOC charge because he neglected to exercise his right to file a law suit under the 1998 EEOC charge in a timely

manner.[5] *See* 42 U.S.C. § 2000e-5(f)(1); *Zipes v. Trans World Airlines,* 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Significantly, Hegger has not argued that his 1998 EEOC charge falls under any of the recognized exceptions to the statute of limitations. Moreover, he does not contend that the allegations within the 2002 EEOC charge constitute a "continuing violation" of the 1998 EEOC charge. *See Valentino v. United States Postal Serv.,* 218 U.S. App. D.C. 213, 674 F.2d 56, 65 (D.C. Cir. 1982)(to demonstrate continuing violation, plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period").

Accordingly, in light of the facts and circumstances surrounding the 2002 EEOC charge, it is clear that Hegger has not established any viable claim under Title VII. *See Gerlach v. Michigan Bell Telephone Co.,* 501 F. Supp. 1300, 1322 (E.D. Mich. 1980)("the claims in the judicial complaint must be like or related to the allegations contained in the EEOC charge"). The 2002 EEOC charge contains an assertion that his employer undertook retaliatory measures against him during a six week period (September 1, 2002 and October 20, 2002) on the basis of his race. Hegger's allegation of disparate discipline are legally and factually deficient.

In pursuit of this issue, Hegger submits that "appellate courts construing Rule 56 standards consistently hold that where, as here, the outcome hinges squarely on state of mind,

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[5] Although the district court based its summary judgment decision, in part, on this issue, Hegger neither challenged nor addressed this point in his appeal.

or intent, or perception, or witness credibility, summary judgment should not be granted." However, he has neglected to proffer *any* evidence which would suggest that his employer acted in a discriminatory manner. Despite having claimed that white co-workers were treated differently from him, he has been unable to identify any white fellow employee who, though similarly situated, was treated differently.

Even if Hegger had satisfied the prima facie requirements of a Title VII violation, he has not asserted any argument that would rebut his employer's nondiscriminatory reasons for the adverse employment action which addressed his absenteeism record, as well as the complaints from fellow-employees about his questionable behavior while in the work place. In fact, Hegger has acknowledged that he did not have his supervisor's permission to leave the plant on any of the three occasions for which he was disciplined. It is our conclusion that the discipline enacted against Hegger was in accord with the progressive policy of the plant for attendance. It is important to note that de minimis employment actions are not materially adverse and, thus, they are not actionable. *Ford v. GMC,* 305 F.3d 545, 553 (6th Cir. 2002). The imposition of discipline against an employee for absenteeism according to company policy is not a materially adverse employment action. *Walker v. Thompson,* 214 F.3d 615, 629 (5th Cir. 2000)(*de minimis* loss of pay did not rise to level of adverse employment action). Therefore, a review of the facts which surround the relevant events suggests that each action taken by Visteon was warranted.[6]

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[6] Although Hegger's brief is not clear as to whether he has conceded his hostile environment claim under Title VII, we have concluded that this allegation should fail for the same reasons given

A. Retaliation Claim

In order to establish a prima facie case of unlawful retaliation under Title VII, a plaintiff must demonstrate, by a preponderance of the evidence, that (1) this statute protects the activity in which he was engaged, (2) his employer knew that he was engaged in this protected activity, (3) an employment action, which was adverse to the plaintiff was undertaken by his employer, and (4) there exists a causal connection between the protected activity and the adverse employment action. *Abbott v. Crown Motor Co. Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Hegger has not offered any evidence which suggests that he was engaged in a protected activity. As a consequence, Hegger's retaliation claim must necessarily fail.

V.

In noting that Hegger has not set forth any evidence - direct or circumstantial - which satisfies the disparate discipline framework, this Court agrees with the decision by the district court to grant a summary judgment in favor of the employer because we also believe that there are no genuine issues of a material fact to be resolved. Accordingly, and for the reasons that have been set forth above, we affirm the decision of the district court in this litigation.

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above. *See Rhea v. Dollar Tree Stores, Inc.*, 395 F. Supp. 2d 696, 2005 WL 2600213, at 4 (W.D. Tenn. 2005).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 3:03-0657

[Filed January 3, 2005]

WILLIAM F. HEGGER, Plaintiff	)
v.	)
VISTEON AUTOMOTIVE SYSTEMS, INC., a/k/a VISTEON CORPORATION FORD MOTOR COMPANY, UNITED AUTO WORKERS INTERNATIONAL, UNITED AUTO WORKERS LOCAL 737, Defendants	)

ORDER

Plaintiff, William F. Hegger, filed this action under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*, the Tennessee Human Rights Act ("THRA"), Tenn. Code. Ann. § 4-21-401 *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 and 623(d) and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 1985. The Defendants Visteon Automotive Systems, Inc., a/k/a Visteon Corporation Ford

Motor Company, United Auto Workers International and United Auto Workers Local 737 (the "Union Defendants"), are respectively Plaintiff's former employer and his union at that employment. The Unions Defendants were dismissed by separate Order. (Docket Entry No. 50).

Before the Court is the Defendant Visteon's motion for summary judgment (Docket Entry No. 30) to which Plaintiff has responded. With few objections as to the relevance and the three objections to non-material facts, the Plaintiff does not otherwise dispute the Defendant's Statement of Undisputed Facts about the timeliness of certain critical events. The Court therefore adopts as the facts for this motion, Plaintiff's responses to the Defendants' Statement of Undisputed Facts except those to which Plaintiff objected and disputed. (Docket Entry No. 43). The latter assertions are not material.

Upon a motion for summary judgment, the factual contentions are viewed in the light most favorable to the party opposing the motion for summary judgment. *Duchon v. Cajon Co.*, 791 F.2d 43, 46 (6th Cir. 1986) *app.* 840 F.2d 16 (6th Cir. 1988) (unpublished opinion). As will be discussed *infra*, upon the filing of a motion for summary judgment, the opposing part must come forth with sufficient evidence to withstand a motion for directed verdict, *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52 (1986), particularly where there has been an opportunity for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court concludes that there are material factual disputes, thus, this section does not constitute a finding of facts under Fed. R. Civ. P. 56(d).

In sum, most of the events at issue occurred prior to 1998. Visteon contends that given the undisputed facts and the charges in Plaintiff's administrative charge filed with the

Equal Employment Opportunity Commission ("EEOC"), Plaintiff's Title VII claims either exceed the scope of his charge and are time barred. For the exhausted claim in Plaintiff's 2002, EEOC administrative charge, Plaintiff has not presented evidence to support his claim of disparate treatment under Title VII of the THRA or the ADEA. In his response, Plaintiff argues only that the conduct after 1999 is actionable under 42 U.S.C. § 1981 that has a four years limitations period, citing *Jones v. R&R Donnelley and Sons*, 124 S.Ct. 1836 (2004).

Based upon the undisputed facts and the Plaintiff's response, the Court concludes that Plaintiff's exhausted Title VII claims did not occur within the applicable limitations period and otherwise are not supported by sufficient facts to support a judgment under Title VII, the THRA nor the ADEA.

The record does not establish any claim in Plaintiff's pleadings under 42 U.S.C. § 1981 nor has Plaintiff sought to amend his complaint to assert these claims, despite the Defendants' motion for summary judgment on the untimeliness of Plaintiff's other claims.

Accordingly, the Defendants' motion for summary judgment (Docket Entry No. 30) is GRANTED and Plaintiff's claims against the Defendants Visteon Automotive Systems, Inc., are DISMISSED with prejudice.

This is the Final Order in this action.

It is so ORDERED.

ENTERED this the 3rd day of January, 2005

/s/ _____
WILLIAM J. HAYNES, JR.
United States District Judge

(2)

No. 06-299

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In The

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WILLIAM F. HEGGER,

Petitioner,

v.

VISTEON AUTOMOTIVE SYSTEMS, INC., and FORD MOTOR CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Sixth Circuit properly affirmed the district court's summary judgment in favor of the defendant employers in this employment discrimination action when: (1) the plaintiff failed to proffer any evidence of illegal discriminatory conduct by the employers; (2) the plaintiff failed to offer any arguments that would rebut the employers' legitimate nondiscriminatory reasons for any adverse employment action that they took against the plaintiff; and (3) most of the actions about which the plaintiff complained were time-barred in any event.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption sets forth all of the parties to this case, except that two other entities were defendants (along with the respondents) in the district court: United Auto Workers International and United Auto Workers Local 737. Those entities were not named as appellees when the petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

The corporate respondents have no parent companies. Moreover, no publicly held company owns ten percent or more of either respondent's stock.

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JURISDICTION

The district court had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the petitioner, William F. Hegger ("Hegger"), asserted claims against the respondents, defendants in the trial court, pursuant to federal statutes. R:1; APX:8-29.[1] The federal statutes on which Hegger predicated his claims included: (1) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; (2) the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 and 623(d); and (3) Section 301 of the Labor Management Relations Act, 29 U.S.C. § 1985. R:1; APX:8-29; APP:11a.

The district court entered a final judgment against the petitioner and in favor of the respondents on January 3, 2005. R:52; APX:27-29; APP:11a-14a. Hegger filed no post-judgment motions. Instead, he filed a notice of appeal on January 26, 2005. R:53; APX:30. Hegger's notice of appeal was timely under rule 4 of the Federal Rules of Appellate Procedure, and the United States Court of Appeals for the Sixth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The Sixth Circuit's decision affirming the district court was issued on June 2, 2006. *See* APP:1a-10a. Hegger filed no post-decision motions. He filed his petition for certiorari with this Court on August 28, 2006. The petition was timely under rule 13.1 of this Court's rules. Although

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[1] The record on appeal is cited both as "R:___," according to docket number, and as "APX:___," according to page number of the joint appendix that the parties filed with the Sixth Circuit. Hegger's petition is cited as "P:___," according to page number. The appendix to Hegger's petition, setting forth the decisions of the court of appeals and the district court, is cited as "APP:___," according to page number.

Hegger states that this Court's "jurisdiction over the instant controversy" arises under 28 U.S.C. § 1252 (P:1), he is mistaken. That statute was repealed in 1988. *See* Pub. L. 100-352, § 1. This Court's jurisdiction actually exists pursuant to 28 U.S.C. § 1254(1).

The respondents agree with Hegger that rule 12.5 of this Court's rules is not applicable to his petition. P:1. The reason for that rule's inapplicability, however, is not, as Hegger says, because his petition is allegedly "predicated on errors made by the United States Court of Appeals for the Sixth Circuit." P:1. Instead, the reason rule 12.5 does not apply to Hegger's petition is simply because he is not a cross-petitioning respondent.

Similarly, although the respondents concur with Hegger that neither rule 29.4(b) nor (c) applies here, the reason is not, as Hegger states, because "neither the United States nor any department thereof is a party to these proceeding." P:1. Rather, the reason that rule 29.4(b) or (c) is inapplicable here is because this case does not draw into question the constitutionality of any federal or state statute.

STATEMENT OF THE CASE

A. Overview of Hegger's Claims Against the Respondents

This case involves alleged employment discrimination. Hegger, the employee, sued the respondents, his employers, for alleged race and age discrimination and retaliation based on disparate discipline, failure to hire or promote, and constructive discharge. R:1; APX:8-29.

Hegger came to work for the Ford Motor Company in 1996 at its Glass Plant facility ("the plant") in Nashville, Tennessee.[2] R:1: APX:11. During the course of Hegger's employment, he filed two charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") – one in 1998 and one in 2002. R:43; APX:124, 139. Hegger had previously filed charges or lawsuits (or both) against three prior employers. R:43; APX:122.

With respect to the charge of discrimination that Hegger filed in 1998, the EEOC issued Hegger a right to sue on March 18, 1998, but he did not bring suit within the designated statutory timeframe. R:43; APX:151; *see* APP:3a. Instead, he waited more than five years before he filed suit in 2003, yet his complaint in the lawsuit identified incidents that he had referenced in the 1998 charge. R:36; APX:414-15.

The 1998 charge detailed incidents occurring between August 26, 1996, and February 7, 1998, and Hegger checked the box on the form to indicate an alleged continuing violation. R:36; APX:414-15. The specified incidents included the application for Jesse Jackson's staff and the handwritten Ku Klux Klan card referenced in the certiorari petition that Hegger has filed with this Court. R:36; APX:414-15; *see* P:3. Neither those incidents nor any of the other incidents mentioned in the brief that Hegger filed with the Sixth Circuit as allegedly supporting a hostile work environment were identified in the charge of discrimination that Hegger filed with the EEOC in 2002,

[2] In 2000, respondent Visteon Automotive Systems, Inc. ("Visteon") became a wholly-owned subsidiary of Ford Motor Company. APP:2a n.1. Hegger and other hourly employees at the plant were loaned to Visteon. APP:2a n.1

which immediately preceded the commencement of this lawsuit. *See* R:36; APX:451. Hegger did not know who was responsible for any of the incidents referenced in his 1998 charge of discrimination, but it is undisputed that he was not subjected to any racial comments or remarks by any supervisor during his employment. R:43; APX:123, 150.

In neither the complaint that he filed following his 2002 charge of discrimination nor in his response to the respondents' motion for summary judgment did Hegger allege or argue that the events or incidents identified in his 1998 charge were part of a continuing violation related to events or incidents referenced in his 2002 charge. R:41; APX:114-16. In fact, in his response to the respondents' motion for summary judgment, Hegger conceded that events occurring before 1999 were time-barred. R:41; APX:115-16.

On appeal from the summary judgment against him, Hegger abandoned his claims regarding alleged age discrimination. *See* APP:5a n.4. Moreover, Hegger did not make any arguments (either in opposition to summary judgment in the district court or in the court of appeals) related to his discharge, medical leave, or the respondents' failure to promote him. *See* R:41; APX:114-16. The court of appeals therefore confined itself not only to the issues raised in Hegger's 2002 charge of discrimination but also to Hegger's arguments concerning the summary judgment against him on his Title VII claim (and the Tennessee state-law counterpart to that claim). *See* APP:5a-10a.

B. Hegger's 2002 EEOC Charge of Discrimination

In the charge of discrimination that Hegger filed with the EEOC in 2002, he checked boxes on the form for race

discrimination, age discrimination, and retaliation – covering the period from September 1, 2002, until October 20, 2002. R:36; APX:451. He did not check the box for an alleged continuing violation, and he did not allege the existence of a hostile work environment. R:36; APX:451. The full text of the substantive portion of Hegger's charge read as follows:

> I have been unfairly disciplined, because of my race Black. I am the only Black employee within my job classification on my crew, and, the most senior in age. I am repeatedly disciplined for alleged infractions that White employees also commit but are not disciplined. I have been treated significantly differently by my employer in the area of attendance and wages based on my race. I have been retaliated against for filing prior charges, making complaints about my unfair treatment, and filing grievances regarding on-the-job harassment. Employees not of my race have been treated more favorably regarding Family Medical Leave Act payments while my benefits and/or payments have been withheld. My employer also violated its own policy when it disciplined me for excused absences.

R:36; APX:451.

Hegger's affidavit in support of the charge clarified that his complaints about discipline related to write-ups for leaving the plant without permission. R:36; APX:452-56. Specifically, between September 1, 2002, and October 20, 2002, Hegger was disciplined three times for absenteeism. R:43; APX:128.

The plant used a progressive discipline system, and Hegger already had four occurrences when he was first

disciplined. R:43; APX:129. The first discipline was a Reprimand and Warning ("R&W"), for an absence on September 20, 2002. R:43; APX:129. Hegger's pay was docked for the time involved in the resulting disciplinary hearing, which was less than one hour. R:43; APX:130. The second incident of discipline was imposed because Hegger left the plant without permission on September 24, 2002. R:43; APX:130. The discipline was an R&W; he was also sent home, and his pay was docked for the balance of shift ("BOS"). R:43; APX:130. The third incident of discipline occurred after Hegger left the plant without permission on October 13, 2002. R:43; APX:131. His discipline was an R&W, plus a one-day suspension, so his pay was docked for the BOS, plus a day. R:43; APX:131.[3]

Except in an emergency, Hegger was required to notify his supervisor before leaving the plant. R:43; APX:133. He admitted, however, that he did not have his supervisor's permission to leave the plant on any of the three occasions for which he was disciplined. R:43; APX:132. Hegger continued the same behavior even after his supervisor told him that he needed permission to leave the plant. R:43; APX:133. As the court of appeals noted, Hegger did not provide any record evidence regarding white employees who were similarly situated but treated differently. R:43; APP:9a.

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[3] It was never clear whether Hegger was trying to complain about that third incident of discipline, given that it was outside the time period specified in the 2002 charge, but was based on an absence that occurred during the time frame specified in the charge – and it also occurred before he signed the charge on October 24, 2002. *See* R:36; APX:451.

C. Hegger's Medical Leave and Termination

Around the same time of his discipline for excessive absenteeism, the employers' Human Resources personnel began getting reports that Hegger was exhibiting strange and inappropriate behavior in the men's restroom at work. R:43; APX:137. Three employees provided written statements to that effect, and other employees also complained about Hegger's inappropriate behavior – namely: (1) that he was masturbating in a restroom stall with the door open; and (2) that he was stuffing paper in the toilet, causing the toilet to overflow, which spread feces and urine in the restroom. R:43; APX:137-38.

Based on the complaints about Hegger's bathroom behavior, Human Resources staff consulted with the plant's Employee Assistance Provider. R:43; APX:140. Hegger was put on paid medical leave in accordance with the collective bargaining agreement, and he was required to undergo a psychological exam. R:43; APX:140-41. Eventually Hegger was cleared to return to work, but instead of returning to work, he requested additional time off to consult with an attorney. R:43; APX:141-42. All of Hegger's requests for additional leave were granted. R:43; APX:142.

When Hegger returned to work, he had a disciplinary hearing, which resulted in a 30-day suspension for the inappropriate bathroom behavior that had been observed. R:43; APX:143. But because he already had an unpaid leave longer than 30 days, the suspension was treated as "time served," and Hegger was able to return to work immediately. R:43; APX:142.

On May 6, 2003, within a few weeks of resuming work, Hegger's employment was terminated for violating

the respondents' No Harassment Policy, after Hegger was caught vandalizing the property of a coworker. R:43; APX:147. Hegger pled guilty to both felony and misdemeanor charges, based both on the vandalism and on his efforts to evade the police. R:43; APX:147.

D. The Summary Judgment Entered by the District Court

In evaluating the respondents' motion for summary judgment, the district court observed that "most of the events at issue occurred prior to 1998." APP:12a. The court therefore concluded that those claims were time-barred. APP:13a. As to the claims that were within the scope of the charge of discrimination that Hegger filed with the EEOC in 2002, the district court noted that Hegger, as the party opposing summary judgment, was required to "come forth with sufficient evidence to withstand a motion for directed verdict." APP:12a. The court concluded that Hegger had failed to do so, and that Hegger's claims, to the extent they were not time-barred, were "not supported by sufficient facts to support a judgment under Title VII." APP:13a. The court accordingly granted summary judgment to the respondents. APP:13a.

E. The Decision of the Court of Appeals

The Sixth Circuit affirmed the summary judgment. APP:1a-10a. In doing so, the court addressed not only the time-barred nature of many of Hegger's claims, but also Hegger's failure to present sufficient evidence to satisfy the requirements of a Title VII claimant.

As to Hegger's time-barred allegations, the court of appeals noted that "[a]lthough Hegger timely filed this

lawsuit on the basis of his claims arising out of the 2002 EEOC charge, these allegations improperly included incidents that had been a part of the 1998 EEOC charge." APP:5a. In further addressing those claims, the court stated that "[a]s a preliminary matter, Hegger's Title VII allegations are limited to those claims that were asserted by him in his 2002 EEOC charge because he neglected to exercise his right to file a law suit under the 1998 charge in a timely manner." APP:7a-8a (footnote omitted). The court also observed that "[a]lthough the district court based its summary judgment decision, in part, on this issue, Hegger neither challenged nor addressed this point in his appeal." APP:8a n.5. Similarly, in the petition that Hegger has filed with this Court, Hegger has likewise not acknowledged or addressed this point.

As to the allegations that were within the scope of Hegger's 2002 charge, and therefore not time-barred, the court of appeals concluded that Hegger had failed to present sufficient evidence – either direct or circumstantial – to prevent the entry of summary judgment in favor of the respondents on his Title VII claim. APP:6a-9a.

On the absence of any direct evidence, the court of appeals stated as follows:

> In this case, Hegger is unaware of the identity of those persons who, in his judgment, are responsible for the alleged discriminatory conduct at his workplace. Moreover, Hegger has been unable to present any evidence which links the decisions by management to the conduct about which he has complained. Although he contends that the thirty-day suspension for his alleged bizarre behavior was the product of a racial animus, it appears from the record that the employer proffered

> a facially legitimate business reason for its administrative action. Rather than imposing another thirty day suspension period upon him, the company essentially considered his medical leave as "time served." Contrary to Hegger's position on this issue, it suggests that his employer was accommodating and displayed sensitivity under these circumstances.
>
> Consequently, we conclude that Hegger has failed to establish that (1) an act of unlawful discrimination was at least a motivating factor in his employer's decision to administratively discipline him or (2) the company acted with a discriminatory motive. Accordingly, Hegger has failed to proffer any direct evidence of illegal discriminatory conduct by Visteon.

APP:6a-7a.

On the question of circumstantial evidence, the court of appeals stated that "in light of the facts and circumstances surrounding the 2002 EEOC charge, it is clear that Hegger has not established any viable claim under Title VII." APP:8a. The court concluded that Hegger's allegations of retaliatory measures and hostile work environment during the six-week period from September 1, 2002, through October 20, 2002, were both "legally and factually deficient." APP:8a, 9a n.6.

In that regard, the court noted that Hegger had "neglected to proffer *any* evidence which would suggest that his employer acted in a discriminatory manner." APP:9a (emphasis in original). The court also observed that "[d]espite having claimed that white co-workers were treated differently from him, [Hegger] has been unable to identify any white fellow employee who, though similarly

situated, was treated differently." APP:9a. As a consequence, the court of appeals concluded that Hegger had not "satisfied the prima facie requirements of a Title VII violation." APP:9a.

The court of appeals further determined that the respondents would have been entitled to summary judgment even if Hegger had been able to present a prima facie case, due to his failure to assert "any argument that would rebut his employer's nondiscriminatory reasons for the adverse action which addressed his absenteeism record, as well as the complaints from fellow-employees about his questionable behavior while in the work place." APP:9a. Noting Hegger's admission that he did not have his supervisor's permission to leave the plant on any of the three occasions for which he was disciplined, the court recognized that the discipline against Hegger was in accordance with the plant's progressive attendance policy. APP:9a. Acknowledging that de minimus employment actions are neither materially adverse nor actionable, the court therefore concluded that "[t]he imposition of discipline against an employee for absenteeism according to company policy is not a materially adverse employment action." APP:9a. The action taken against Hegger was, in the view of the court of appeals, entirely "warranted" by "the relevant events." APP:9a.

Finally, in affirming the summary judgment in favor of the respondents for unlawful retaliation under Title VII, the court of appeals observed that Hegger had not "offered any evidence which suggests that he was engaged in a protected activity." APP:10a. Because evidence of that nature is essential to state a retaliation claim under Title VII, the court concluded that Hegger's retaliation claim "must necessarily fail." APP:10a.

In Hegger's petition, he states that "[i]n the concluding paragraph of the Sixth Circuit's Opinion, the author, District Judge Cook, flatly held (in speaking for the entire panel) that the record disclose [sic] genuine issues of material fact." P:5. The respondents must assume that Hegger inadvertently omitted the word "no" after the word "disclose" because the court of appeals held precisely otherwise. In the concluding paragraph of its decision affirming the summary judgment against Hegger, the court of appeals actually stated as follows:

> In noting that Hegger has not set forth any evidence – direct or circumstantial – which satisfies the disparate discipline framework, this Court agrees with the decision by the district court to grant a summary judgment in favor of the employer because *we also believe that there are no genuine issues of a material fact to be resolved.*

APP:10a (emphasis added).

ARGUMENTS FOR DENYING THE PETITION

A. THIS COURT SHOULD DENY HEGGER'S PETITION EVEN IF IT BELIEVES THAT THE COURT OF APPEALS ERRED IN AFFIRMING THE SUMMARY JUDGMENT AGAINST HIM

Rule 10 of this Court's rules cautions that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. That is the situation here; in his petition, Hegger is saying merely that the court of appeals misapplied the well-established standard for determining whether summary

judgment is appropriate. *See* P:4-5. Even if he were right in his contention (although he is not), that would not render this case worthy of review by this Court.

The Sixth Circuit's decision in this case: (1) does not conflict with a decision of any other United States court of appeals on any important issue of law; (2) does not conflict with a decision of any state court of last resort on any issue of federal law; (3) does not represent such a departure from the accepted and usual course of judicial proceedings, or sanction such a departure by the district court, as to call for the exercise of this Court's supervisory power; (4) does not address any legal or factual issue of nationwide significance; (5) does not present any danger of creating uncertainty or confusion in future cases; (6) does not present the potential for affecting other cases; (7) does not create problematic precedent; and (8) does not represent an unjust result. *See generally* S. Ct. R. 10.

In short, there is nothing "certworthy" about this case. It is a standard, basic employment discrimination case in which the plaintiff lost and is simply seeking to keep fighting as long and as hard as he possibly can. This Court's resources, however, should be devoted to other matters. Certiorari should therefore be denied.

Moreover, even this Court's agreement with Hegger's argument would not affect the ultimate outcome here. His sole argument is it is improper, in the context of summary judgment, for a court to resolve issues of "state of mind, intent, or witness credibility." P:4. Whether that is true makes no difference here, because the Sixth Circuit did nothing of the sort, as even a cursory reading of its decision plainly reveals.

What the court of appeals did instead was affirm the district court's summary judgment on the basis of Hegger's complete failure to present any evidence to support necessary elements of his Title VII claim. The deficiencies in his evidentiary showing included: (1) his failure to show that any white coworker was similarly situated, but treated differently; (2) his failure to show that management was linked in any way to the racial conduct about which he complained; (3) his failure to offer anything that would rebut his employers' legitimate nondiscriminatory reasons for the discipline taken against him under the plant's policy; (4) his admission that he did not have his supervisor's permission to leave the plant on the three occasions for which he received discipline, even though he knew that such permission was required; (5) his failure to timely file suit for the alleged incidents that were the subject of the charge of discrimination that he filed with the EEOC in 1998; and (6) the undisputed fact that the termination of Hegger's employment occurred for reasons for which he later pled guilty in a subsequent criminal proceeding.

Despite what Hegger says in his petition, none of these points presented factual issues concerning "state of mind, intent, or witness credibility" (P:4) – or in any other way. They were all undisputed matters of record before the court of appeals, and, as the court of appeals correctly recognized, those deficiencies in Hegger's case entitled the respondents to summary judgment on Hegger's Title VII claims irrespective of whether *other* issues of "state of mind, intent, or witness credibility" (P:4) may have remained in the case. The evidence that *did* plainly exist prevented Hegger from proving his case. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth a plaintiff's burden in Title VII

actions); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n.3 (2003) (recognizing that the courts of appeals apply the *McDonnell Douglas* standard in determining whether to grant summary judgment in Title VII cases); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (standard for summary judgment); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-52 (1986) (party opposing summary judgment must come forth with sufficient evidence to withstand a motion for directed verdict).

Thus, because the respondents were entitled to judgment as a matter of law regardless of how any of the unspecified issues of "state of mind, intent, or witness credibility" to which Hegger refers (P:4) may have been resolved, this Court would therefore be engaging in a mere academic exercise if it used this case to determine whether the court of appeals improperly resolved issues of that nature. This Court's decision would make no difference to the ultimate resolution of the case. And the respondents suggest that this Court's scarce resources should instead be devoted to cases presenting important questions to which this Court's answers actually affect the outcomes. *See, e.g., The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). That is not the situation here.

B. THE COURT OF APPEALS CORRECTLY AFFIRMED THE SUMMARY JUDGMENT AGAINST HEGGER AND APPLIED WELL-SETTLED PRINCIPLES OF LAW IN DOING SO

In the foregoing section of this brief, the respondents assumed at times, for purposes of argument, that the court of appeals was incorrect in affirming the summary judgment that the district court entered against Hegger. The respondents obviously believe otherwise. In truth, the

Sixth Circuit ruled properly, and it applied well-settled, unremarkable principles of law when it did so. For that additional reason, Hegger's petition for a writ of certiorari should be denied.

In his petition, Hegger mentions only a single issue: whether the court of appeals erred in holding there were no genuine issues of material fact presented by the record. Hegger wholly ignores the basic contention below that not all of his claims were properly in front of the district court. The only allegations properly before that court were the alleged incidents of disparate treatment referenced in Hegger's 2002 EEOC charge, occurring between September 1, 2002, and October 20, 2002. Yet, in his petition, Hegger says nothing whatsoever about events occurring during that relevant time period, choosing instead to confine himself to the time frame for which his claims are unquestionably time-barred.

The court of appeals, however, quite properly limited itself to the claims that Hegger made in his 2002 EEOC charge. *See Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 545-46 (6th Cir. 1991). But Hegger utterly failed to present sufficient evidence to support those claims.

To establish a claim of disparate treatment, Hegger was required to prove that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; and (3) similarly situated employees from outside the protected class were treated more favorably. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004); *Rice-Lamar v. City of Ft. Lauderdale*, 232 F.3d 836, 843 (11th Cir. 2000). Hegger presented no evidence as to the second and third of those elements. Nor could he

show that his employers' stated reasons for imposing discipline against him were pretextual.

In the time period identified in his charge, Hegger was disciplined three times, all for leaving the plant early. However, he presented no evidence that he was treated any differently than anyone similarly situated outside the protected class. Hegger was required to get permission from his supervisor to leave work early. He failed to do so and was disciplined as a consequence. Even if Hegger did not understand that supervisory permission was required, he should have known that after he was disciplined the first time. But instead of changing or correcting his behavior, he continued to leave the plant early without permission.

Moreover, the discipline given to Hegger was in line with the progressive discipline policy of the plant for attendance. Prior to September 1, 2002, Hegger had four occurrences. For the fifth occurrence (which was the first discipline within the time frame of the charge), Hegger received a R&W and was docked the time for the resulting disciplinary hearing. For the next occurrence, he was given a R&W and sent home for the BOS. For the next occurrence, he received a R&W, and was sent home for BOS, plus one day. As the court of appeals correctly recognized, that discipline was not an adverse employment action sufficient to support a discrimination or retaliation claim, because it was not "materially adverse." *See Ford v. General Motors Corp.*, 305 F.3d 545, 553 (6th Cir. 2002). *De minimis* employment actions are not materially adverse and therefore not actionable. *Id.* Simply put, the write-ups and lost time did not rise to the level of an adverse employment action, as a matter of law. *See Walker v. Thompson*, 214 F.3d 615, 629 (5th Cir. 2000) (*de minimis* loss of

pay does not rise to the level of an adverse employment action).

In neither the district court, the court of appeals, nor this Court did Hegger identify any evidence suggesting that the discipline he received was because of any protected activity or any protected characteristic. Nor has he ever even attempted to rebut legitimate explanations offered by the respondents for that discipline, especially in light of his own admission that he did not get permission from his supervisor for his absences. *See Anthony v. BTR Auto. Sealing Sys.*, 339 F.3d 506, 516 (6th Cir. 2003).

It was simply not enough – in the district court, in the court of appeals, or in this Court – for Hegger to assert that he had been treated differently. He presented no evidence whatsoever to support that assertion. The court of appeals was therefore entirely correct in affirming the summary judgment against Hegger on his Title VII claim. He has presented no colorable argument to the contrary, and he has certainly provided this Court with no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Court deny Hegger's petition for a writ of certiorari.

Respectfully submitted,

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